United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11388

WELLS, INC., a corporation, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

AND

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

WELLS, INC., a corporation, RESPONDENT

REPLY OF WELLS, INC., A CORPORATION, PETITIONER AND RESPONDENT

Respectfully submitted,

LOUIS H. CALLISTER,
Attorney for Petitioner.

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This reply is in response to the brief recently filed on behalf of the National Labor Relations Board, who is respondent to this petitioner's petition for writ of review; and the said National Labor Relations Board has also filed its petition for enforcement and, therefore, is named as petitioner in said brief, and Wells, Inc., named respondent in respect to said petition for enforcement.

For convenience and brevity, in this brief we will refer to the National Labor Relations Board as the Board.

In view of the fact that Wells, Inc., has not yet received the printed brief of the Board, but only the typewritten brief, it, of course, has no alternative but to refer to the pages of the typewritten brief. It must, therefore, be remembered that any reference to the Board's brief is to the typewritten copy.

ARGUMENT

Interference, Restraint and Coercion

The Board in its brief on page five states in substance that Wells, Inc., undertook a campaign to frustrate the selection of the Machinists as bargaining representative and to restrain and coerce them into repudiating that union. After this statement we note that the Board has not cited any pages of the transcript to substantiate this assertion, nor can we believe that the references made in respondent's brief substantiate in any way such a statement. As a matter of fact the Board found (tr. 28 and 29) that since the Union's majority was procured with the direct and open assistance of a supervisory employee (foreman Benton), it cannot be said that the Union represented the free and untrammeled will of the employees and hence the Union's claim that it represented a majority could not be recognized.

Foreman Benton is the employee, the Board found, that Wells, Inc., had discriminatorily discharged. There is not one scintilla of evidence in the record in this case that any action by any representative of the employer, except foreman Benton, in any way interfered with the lawful and untrammeled right of their employees to belong to a labor organization, or any evidence that any action of any of Wells' representatives had such an effect. We must admit, and we agree with the finding of the Board (tr. 28 and 29), that the lawful and untrammeled rights of the employees of Wells, Inc., were interfered with by management's representative, foreman Benton, who was discharged by Wells, Inc.

It is inconsistent for the Board in its brief filed in this cause to contend that Wells restrained and coerced the employees into repudiating the Union when not only is there no evidence to substantiate such fact, but that the Board in its findings (tr. 28 and 29) found to the contrary. How could Wells in one act restrain and coerce the employees in repudiating the Union and at the same time through its representative (foreman Benton) coerce and intimidate the employees in joining the Union?

In answer to the Board's statement of interference, restraint and coercion in pages 6, 7 and 8 of its brief, we refer this Honorable Court to pages 21, 22, 23, 24 and 25 of

petitioner's brief in answer thereto, rather than repeat the same in this reply brief.

It must be remembered (tr. 31) that the Board ordered that the complaint be dismissed insofar as it alleged that the respondent refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in an appropriate unit. Without question, had the company recognized the Union as the representative of its employees, and any employee or rival union filed charges against Wells, Inc. for such action, the Board could within its discretion file unfair labor charges against Wells, Inc., for recognizing such union. The reason being, of course, that management's representative (foreman Benton) had helped procure by his activities a majority of the employees in joining the Union.

The Discrimintory Discharge of Foreman Benton

We are amazed at the statement of the Board on page 17 of its brief that Wells, Inc., by discharging foreman Benton, infringed their right freely (referring to employees to select the Machinists as their bargaining representative, and in so doing violated the act.

Since the Board found (tr. 28 and 29) that the Union's majority was procured with the direct and open assistance of foreman Benton and, therefore, the claim of the Union that it represented the employees, could not be recognized as the valid majority, how then could it be said that by his discharge Wells, Inc., interfered with the employees' right to freely select the Machinists as their bargaining representative; and, therefore, in so discharging foreman Benton, violated the act.

In one breath the Board finds (tr. 28 and 29) that because of management's activities in helping procure a majority of the employees to join the Union (foreman Benton's activities), that it in substance frustrated the untrammeled right of its employees to select their own representative; then in the next breath it states that by stopping that activity by management's representative (foreman Benton) by discharging him, it has infringed the free right and will of the employees to select the Machinists as their bargaining representative. We are unable to understand how the Board can take such a position.

On page 18 of the Board's brief it states in substance that the Board found it essential to effectuate the policies of the Act that the effects of petitioner's object lesson of reprisal against employees who affiliated with the Machinists be dissipated. In the first place, foreman Benton was not in the same category as the employees who joined the Machinists Union, inasmuch as he was not among the rank and file employees, but management's representative. There is no evidence to support such a statement that this was petitioner's object lesson of reprisal against employees who affiliated with the Machinists. Foreman Benton was management's representative. The Wells, Inc. has had other foremen affiliated with the machinists, and the employees so knew it, (tr. 128 224 and 32).

The Board has never answered in its brief the statement of Wells, Inc., that an employer such as Wells, Inc., has the affirmative duty to terminate coercive activities of its representatives interfering with the employees' freedom to self-organization, and so long as the employer was doing only what the act commanded him to, that is, to refrain from coercing his employees in the exercise of their right to self-organization, either directly or through his agents, the actual motivation for his conduct is beside the point.

Since foreman Benton engaged in activities in behalf of the rank and file Union in his capacity as management's representative, Wells, Inc., was at liberty to take any steps it deemed appropriate to maintain neutrality.

The Board fails to answer the statement of Wells, Inc., that upon broad implications of the decision in this case reached by the majority of the Board, with one member dissenting, the principle of imputation to the employer of responsibility of the facts and statements of supervisory employees cannot longer prevail if foremen are free to engage in activities in behalf of a rank and file union. Further, the Board by this decision in protecting supervisory employees (such as foreman Benton in his wrongful activities) who have authority to hire and discharge and otherwise effect the tenure and conditions of employment, in their activities in behalf of the rank and file union, the Board has impaired the basic principles, essential for the preservation of employee's freedom to join the labor or-

ganization or select a bargaining representative of their choice.

Where a just ground of discharge appears, it is a matter of mere speculation to say what the motive was for the discharge.

When an employer is bound by law to terminate activities which are prohibited by law, it would be a mere matter of speculation to say what the purpose was and the motive for discharge. The employer in this instance was duty bound to terminate the activities of foreman Benton in any way he saw fit, and an attempt to determine what effect his discharge had would be pure speculation.

Reinstatement of Jack Benton

The Board in its brief did not have much to say in support of the contention that the Board did not err in entering its order directing the reinstatement of foreman Jack Benton to his former position and to make whole the foreman Jack Benton for any loss of earnings he may have suffered by reason of petitioner's alleged discrimination against him.

We certainly can understand why the Board does not have much to say on this point, because it is clear that the Board erred in directing such reinstatement. How can it be said that to effect the purposes of the National Labor Relations Act, it is necessary to offer reinstatement and to make whole any loss of earnings to a foreman who has utterly disregarded the law and subjected his employer to charges of unfair labor practices. To direct that Wells, Inc., comply with such order is to compensate a manger's representative for his wrongful conduct and activities. A Board order directing the reinstatement with back pay of the allegedly discriminatory discharge should not be enforced where the order is based upon mere speculation and conjecture. It is fundamental that one of the purposes of the act is to stop abuses that will interfere with the right of the employee to self-organization.

The Board in its brief puts great emphasis upon the ability of foreman Benton. The question of efficiency or Benton's ability has nothing whatsoever to do with the issue in this case. The facts are simply that Benton, by his

unlawful acts, made it mandatory that Wells, Inc., take some action to terminate his unlawful activities. The method and manner of terminating these activities certainly should be left in the discretion of the employer. If Wells, Inc., had told Benton he was discharged because he was soliciting membership in the rank and file union over whom he directed and supervised, the employer would immediately have been subject under the Board's contention of an unfair labor charge. The Board's theory of this case puts an employer in a very untenable position.

CONCLUSIONS

We just cannot understand how it could be said that the reinstatement of foreman Jack Benton to his former position of management's representative (and we have no asurance he will not continue as union steward and union trustee) under the circumstances in this case effectuates the policies of the National Labor Relations Act.

Certainly such reinstatement would have the effect of giving the stamp of approval of foreman Benton's activities in procuring membership in the rank and file employees whom he supervised, and thereby interfering with the free and untrammeled rights of the employees to belong to any labor organization they desired.

The Board in their brief has put forth a very inconsistent argument. In one breath they contend that by the discharge of Benton and the activities of the management's representatives, the right of the employees to join a labor organization of their own free will and choice has been frustrated. Yet the Board found that by the activities of foreman Benton the majority procured was not a valid majority and in substance that management had procured the majority through its representatives. It cannot be said that management in one action has frustrated the right of the employees to join a labor organization and then in the next breath and under the same circumstances contend that the acts complained of resulted in unlawfully and improperly soliciting and procuring a majority of the employees in the Machinists Union. It just does not make sense.

The Board in its brief has not referred to any evidence to substantiate their argument that the various conversations of management's representatives in any way interfered with the right of the employees to exercise their rights under the act of joining a labor organization; neither is there any evidence referred to in which it could be inferred that such statements in and of themselves interfered with any rights of the employees.

We have not gone into much detail in this reply brief because we feel that the Board's brief raises no new issues and, therefore, we respectfully refer this Honorable Board to the brief heretofore filed by Wells, Inc.

Wells, Inc. feels that the Board's findings arenot supported by substantial evidence, that its order is not valid and proper, and that a decree should not be issued enforcing the order in full or in part.

Respectfully submitted,

LOUIS H. CALLISTER,

Attorney for Petitioner.